United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original and Affidavit of Mailing

77-1072
77-1073

To be argued by
JAN F. CONSTANTINE

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1072, 77-1073

UNITED STATES OF AMERICA,

Appellee,

—against—

PHILIP PETER ARCURI, WILLIAM J. ROTHAAR and ANTHONY S. SCIOTTO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

BRIEF FOR THE APPELLEE

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Eastern District of New York.

ALVIN A. SCHALL,
JAN F. CONSTANTINE,
Assistant United States Attorneys,
Of Counsel.

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FOR THE SECOND CIRCUIT

Docket Nos. 77-1072, 77-1073

UNITED STATES OF AMERICA,

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—against—

PHILIP PETER ARCURI, WILLIAM J. ROTHAAR and ANTHONY S. SCIOTTO,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

Philip Peter Arcuri, William J. Rothaar and Anthony S. Sciotto appeal from judgments of the United States District Court for the Eastern District of New York (Edward R. Neaher, *J.*), convicting them, after a jury trial, of knowingly and intentionally possessing with intent to distribute a quantity of phenobarbital, in violation of Title 21, United States Code, Section 841(a)(1), and Title 18, United States Code, Section 2.[1] Arcuri was

[1] Appellants were convicted on Count One of a two count indictment (76 Cr. 382). Count Two of the indictment, charging appellants with conspiracy to possess with intent to distribute tablets of phenobarbital, in violation of Title 21, United States Code, Section 846, was dismissed by Judge Neaher at the conclusion of the Government's case. Also named as a co-defendant in the indictment was Joseph F. Grande. Grande, who testified for

[Footnote continued on following page]

sentenced to eighteen months imprisonment plus a special parole term of two years; Rothaar was sentenced to three years imprisonment pursuant to Title 18, United States Code, Section 4205(b)(2), plus a one year special parole term; Sciotto was sentenced to two years imprisonment under Title 18, United States Code, Section 3651, to serve six months with the balance of the prison sentence to be suspended and to be followed by three years of probation plus a special parole term of two years. Appellant Arcuri is free on bail pending this appeal. Appellant Rothaar is presently incarcerated, and appellant Sciotto is presently at liberty after having served a six months term of imprisonment in accordance with the court's sentencing order.

On appeal, all appellants challenge the sufficiency of the evidence. Appellants Arcuri and Rothaar also challenge the admission against them of certain testimony on the ground that it was hearsay; they contend that absent this testimony, the evidence against them was insufficient to support the submission of the possession count to the jury. In this regard, they argue that the district court erred in denying their motion for acquittal. In addition, appellant Rothaar argues that certain items received in evidence by the district court subject to connection should have been excluded as a result of the dismissal of the conspiracy count.

Statement of Facts

On May 20, 1976, Joseph F. Grande was arrested at his laundromat on 439 Kings Highway, Brooklyn, New York, by agents of the Drug Enforcement Administration

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the Government at appellants' trial, entered a guilty plea to the possession count, and the conspiracy count was dismissed against him on motion of the Government. Grande received a suspended prison sentence and was placed on probation for a period of three years.

(hereinafter "DEA"). At the time of his arrest, Grande had in his possession approximately 350,000 phenobarbital pills (Gov't. Exs. 4-10). After his arrest, Grande agreed to co-operate with the authorities.[2]

At trial, Grande testified that appellant Sciotto had called him at his laundromat on May 18, 1976, and had told him he had some 350,000 "pills for the head". The following day, May 19, 1976, Sciotto delivered the pills to the laundromat, packaged in seven cartons in the trunk of a 1972 white Lincoln (49).[3] According to Grande, Sciotto stated that he did not know what kind of pills were in the carton, and, after seeing the old and burnt condition of the pills, labelled "Phenobarbital", he (Sciotto) apologized for bringing them. Grande testified that Sciotto told him that "they just gave him the keys to the car, telling him the stuff was in the trunk and they wanted four cents apiece for them." (48, 50).

Grande told Sciotto he did not want the pills and asked him to "get them out of here." (50). Sciotto responded that he was going to "call the guys." (50). He then made a telephone call and left the premises.

Later that afternoon, Sciotto called Grande and told him the "guys" wanted $500, and that "he was stuck" (51). He asked Grande to get him "off the hook." (51). Grande again said he didn't want the pills, at which time Sciotto put an unidentified individual on the phone. Grande repeated that he didn't want the pills and that they should be removed from his laundromat or he would dump them (51-52). Grande testified that since he

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[2] As noted above, Grande pleaded guilty to the possession charge and testified for the prosecution. In return for his testimony, the government agreed to apprise the sentencing judge of his cooperation (34-36).

[3] Unless otherwise indicated, references are to pages of the trial transcript.

could not get in touch with Sciotto again that day, he decided to dispose of the pills himself (52).

The next day, May 20, 1976, Grande was arrested by DEA agents as he was loading his car with the cartons of pills (52-53, 119).

After his arrest, Grande was taken to DEA offices in Manhattan where he made a telephone call to appellant Sciotto and arranged to meet with him to discuss an offer from an undisclosed buyer of 2¢ a pill (53-54). During the conversation, recorded by DEA agents with Grande's consent, Sciotto indicated that he was apprehensive, but agreed to meet Grande at 1:40 P.M. that afternoon on the corner of Nostrand and Avenue M, Brooklyn, to discuss the deal (Gov't. Ex. 1).

Grande and DEA Agent McKinley then proceeded to the laundromat to call Sciotto and tell him they would be late for the pre-arranged meeting (66, 192-195). Shortly after their arrival, however, Sciotto, accompanied by appellants Rothaar and Arcuri, arrived at the laundromat unexpectedly. Both Grande and McKinley testified that Sciotto went to the office and told Grande that "the guys were here for the money." (67, 170). Rothaar and Arcuri waited for Sciotto in the front room of the laundromat. At Grande's request, Sciotto left the office, and all three appellants walked out of the laundromat to a pizza parlor down the street. A few minutes later, Sciotto, Rothaar and Arcuri met Grande outside the laundromat and walked together into the laundromat office where Agent McKinley was waiting (70-71, 340). McKinley was then introduced by Grande to all three appellants as "the gentleman who offered two cents." (71-72, 172-173). After Rothaar and Arcuri shook hands with McKinley, Arcuri turned to leave and Rothaar, shaking his head from side to side, followed him (72, 173). When asked by Grande if he wanted to talk to the

man, Arcuri replied: "Let him talk to him (McKinley)," referring to Sciotto (73). Arcuri and Rothaar then left the laundromat office and all three appellants were immediately arrested.

DEA agents testified as to occurrences taking place subsequent to appellants' arrest. Sciotto, Arcuri and Rothaar were taken to DEA offices for processing. At his interview with a DEA agent, Arcuri denied having a driver's license and owning a car (176). Thereafter, a New York State insurance identification card for a 1972 white Lincoln was found in Arcuri's wallet (Gov't. Ex. 3). The car identified in the card was the same car driven by Sciotto the previous day when he had delivered the phenobarbital pills to Grande. This same vehicle was parked across the street from the laundromat and was subsequently seized by DEA agents. The agents found several items in the glove compartment of the seized car, including a bottle of phenobarbital pills identical to those bottles in the cartons recovered from the laundromat (Gov't Ex. 13), gloves, a hat (Gov't Ex. 20) cards addressed to Arcuri (Gov't. Exs. 17 and 18) and a battery guarantee in Arcuri's name (Gov't. Ex. 15) (388-392).

After hearing all the testimony on the Government's case, Judge Neaher denied appellants' motions for judgment of acquittal but dismissed the conspiracy count as to all appellants. In addition, the court instructed the jury to disregard certain testimony and exhibits received in evidence subject to connection (605). Judge Neaher specifically excluded testimony relating to the recovery of the keys to the white Lincoln and appellant Rothaar's trip to DEA offices after arrest as well as precluding the keys for the white Lincoln from admission in evidence (513-514, 521).

In overruling appellants' motions for acquittal, the trial court specifically found that there was sufficient

circumstantial evidence for the jury to conclude that appellant Sciotto was at the laundromat to collect money and that appellants Rothaar and Arcuri were aiders and abettors (505-506).

No witnesses were called by the defense.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN REFUSING TO EXCLUDE CERTAIN TESTIMONY AGAINST APPELLANTS ROTHAAR AND ARCURI, NOTWITHSTANDING DISMISSAL OF THE CONSPIRACY COUNT.

On appeal, appellants Rothaar and Arcuri contend that a statement made by their co-defendant, appellant Sciotto, implicating them in the illicit transaction was improperly admitted in evidence against them in light of the court's dismissal of the conspiracy count. Specifically, they challenge Sciotto's declaration to Grande, made in the presence of Agent McKinley, that "I brought the fellows to collect the money." (67). We submit that the claim is without merit.

Sciotto's statement was properly admissible as a declaration of a co-conspirator made during the course of, and in furtherance of, the conspiracy, as provided in Rule 801(d)(2)(e), Federal Rules of Evidence.[4] *See also*

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[4] Rule 801(d)(2)(e) provides:

"Statements which are not hearsay. A statement is not hearsay if—

(2) The statement is offered as part of and is . . . (e) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy."

Lutwak v. *United States*, 344 U.S. 604, 617 (1953); *Krulewitch* v. *United States*, 336 U.S. 440, 443 (1949); *Fiswick* v. *United States*, 329 U.S. 211, 217 (1946).

Cases in this circuit have held that the trial judge has wide discretion in determining preliminary questions of fact relating to admissibility of testimony under the co-conspirator exception to the hearsay rule. *United States* v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Ragland*, 375 F.2d 471, 478-479 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); *United States* v. *Nuccio*, 373 F.2d 168, 173 (2d Cir. 1967), *cert. denied*, 392 U.S. 930 (1968); *United States* v. *Dennis*, 183 F.2d 201, 230-231 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). And the course to be followed by the judge when statements of co-conspirators are offered in evidence by the prosecution has been clearly delineated by this Court.

> "[T]he judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, *by a fair preponderance of the evidence independent of the hearsay utterances.*" (emphasis added).

United States v. *Geaney*, *supra*, 417 F.2d 1116, 1120; *See also*, *United States* v. *Stanchich*, 550 F.2d 1294, 1297-98 (2d Cir. 1977); *United States* v. *Ragland*, *supra*, 375 F.2d 471, 477. In addition, in determining whether the fair preponderance test has been met, the judge is entitled to draw such inferences as the facts permit. *United States* v. *Padilla*, 374 F.2d 996, 998 (2d Cir. 1967).

We submit that based on the evidence presented by the Government, Judge Neaher properly admitted Sciotto's declaration as a co-conspirator's statement. The record below provides sufficient independent evidence of appel-

lants' participation in the illicit association to meet the fair preponderance test.

Sciotto delivered the phenobarbital by arriving at the laundromat on May 19th in a 1972 white Lincoln, subsequently connected to appellant Arcuri by a New York State insurance card found in his wallet when he was searched after his arrest (Gov't. Exhibit 3). Other items, including letters and invitations addressed to Arcuri and a battery guarantee in his name, were recovered from the glove compartment of the vehicle (Gov't. Exhibits 13-20). Moreover, appellants Rothaar and Arcuri were waiting for Sciotto in front of the laundromat on May 20th, left with him to go to the pizza parlor down the street and returned with him to the laundromat. In addition, they were introduced to Grande outside the laundromat, and, in turn, were present when Grande introduced Agent McKinley as "the gentleman who offered 2¢." (71). When asked by Grande if he wanted to talk about the money, Arcuri answered "Let him (referring to Sciotto) talk to him." (73). He then left the room, followed by Rothaar, who shook his head from side to side in rejection after hearing the 2¢ figure. (72-73). The use of Arcuri's car to deliver the pills on May 19th and the presence and actions of Arcuri and Rothaar on May 20th at, and in the vicinity of, the laundromat clearly established the participation of Arcuri and Rothaar in the conspiracy by a fair preponderance of non-hearsay evidence.

Also to be rejected is the claim that the admission of Sciotto's statement was barred by the dismissal of the conspiracy count. The standard for determining the admissibility of co-conspirator statements is whether a joint enterprise or joint undertaking existed, not whether it was technically a conspiracy. *United States* v. *Richardson*, 477 F.2d 1280, 1283 (8th Cir.), *cert. denied*, 414 U.S. 843 (1973); *Carbo* v. *United States*, 314 F.2d 718,

737 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964). Furthermore, acquittal on a conspiracy charge will not affect the finding of admissibility as to the co-conspirator's statement, since acquittal implies only a failure to prove conspiracy beyond a reasonable doubt, whereas the standard for admissibility of the statement is, as discussed above, a fair preponderance of non hearsay evidence. *United States* v. *Stanchich*, *supra*, 550 F.2d 1294, 1298-99 (2d Cir. 1977); *see also, United States* v. *Zane*, 495 F.2d 683, 692 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). Thus, it was entirely proper for the court to dismiss the conspiracy count for failure to meet the higher test for submission to the jury, while finding sufficient independent evidence to meet the lower test required for admissibility of a co-conspirator's declaration.[5]

POINT II

THERE WAS NO ERROR WITH RESPECT TO THE ADMISSION IN EVIDENCE OF ITEMS FOUND IN THE SEIZED VEHICLE.

Appellant Rothaar contends that certain evidence should have been excluded as against him. Specifically, he takes issue with the following items:

> Government Exhibit 3 (New York State insurance card for seized automobile);
>
> Government Exhibits 4-12 (phenobarbital tablets seized from Grande on May 20, 1976);
>
> Government Exhibits 13-20 (items recovered from glove compartment of the 1972 white Lincoln, in-

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[5] Notwithstanding the trial judge's dismissal, we contend that there was sufficient evidence to sustain convictions on the conspiracy count as well as the possession count. See Point III, *infra*. In this regard, we believe that the district court erred in failing to submit the conspiracy charge to the jury.

cluding a bottle of phenobarbital tablets, a traffic summons, a hat, gloves, letters and an invitation addressed to appellant Arcuri, as well as a battery guarantee in Arcuri's name);

Government Exhibit 21 (advice of rights card, used to give Arcuri his *Miranda* warnings);

Government Exhibit 22 (keys from the 1972 Lincoln).

Rothaar argues that the New York State insurance card for the white Lincoln (Government Exhibit 3) and the advice of rights card used to give Arcuri his *Miranda* warnings (Government Exhibit 21) should have been barred from evidence as against him upon dismissal of the conspiracy count. With respect to the phenobarbital seized from Grande on May 20th (Government Exhibits 4-12) and the various items recovered from the Lincoln (Government Exhibits 13-20), he claims that there was not a sufficient connection established between himself and the evidence.

Rothaar's contentions are frivolous. In the first place, the phenobarbital seized from Grande was, in effect, the corpus delicti in the case. It had to be admitted to show that a crime had been committed. Once the tablets were in evidence, it was the task of the Government to tie the three defendants to the contraband. What Rothaar is saying is that the prosecution cannot introduce evidence that a crime has been committed without first proving that the defendant committed the crime. That is absurd.

Similarly, we fail to see what complaint Rothaar can make with respect to the New York State insurance card, Arcuri's advice of rights form and the various items recovered from the 1972 Lincoln. All of these items were innocuous pieces of evidence which pertained mainly to Arcuri, the owner of the car. Plain com-

mon sense makes it clear that, with the obvious exception of the advice of rights card, the sole purpose of the bulk of this evidence was to link Arcuri to the vehicle, while the bottle of phenobarbital tablets tended to connect the white Lincoln to the contraband delivered to Grande on May 19th. We fail to see how the jury could have considered it otherwise.

In any event, it is clear that there was considerable circumstantial proof linking the car to the drug transaction and Rothaar to the car. Grande identified the white Lincoln as the vehicle used to deliver the pills on May 19th. Then, on May 20th after a telephone conversation between Sciotto and Grande about a possible buyer for the phenobarbital, Rothaar and Arcuri accompanied Sciotto into the laundromat, and waited in the front room nearby while Sciotto talked with Grande. Further, Sciotto referred to Rothaar and Arcuri as "the fellows that come for the money," and all three appellants left the laundromat together and returned together a few minutes later. In addition, the DEA agents testified that they did not see any of the appellants until they were walking in the immediate vicinity of the laundromat, and the white Lincoln, the car used to deliver the phenobarbital pills on May 19th, was found parked across the street from the laundromat after appellants' arrests. From this evidence, it could properly be concluded that all three appellants drove to the laundromat together in the 1972 white Lincoln, parked across the street and entered the laundromat to make a deal with Grande and an unidentified individual to sell the phenobarbital which they assumed to be on the premises. Rothaar was thus clearly linked to the 1972 white Lincoln.[6]

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[6] No discussion is required of Rothaar's claim that dismissal of the conspiracy count required that items recovered from the white Lincoln be barred from evidence. As we have demon-

[Footnote continued on following page]

POINT III

THE EVIDENCE WAS SUFFICIENT TO CONVICT.

All three appellants contend that there was insufficient evidence to establish their guilt beyond a reasonable doubt.

In determining whether there was sufficient evidence to sustain a verdict, this Court will view the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60 (1942), and will construe all permissible inferences in the Government's favor. *United States* v. *Marchisio*, 344 F.2d 653, 662 (2d Cir. 1965); *United States* v. *Dardi*, 330 F.2d 316, 325 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). The test is whether or not there was sufficient evidence on the basis of which a reasonable juror could have found appellants guilty. *United States* v. *Rivera*, 513 F.2d 519, 528-530 (2d Cir.), *cert. denied*, 423 U.S. 948 (1975); *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 243-45 (2d Cir. 1972). We believe there clearly was.

A. *Sciotto*

Appellant Sciotto argues that there was no proof offered in evidence that he knew the pills delivered were phenobarbital, a controlled substance, and that at no

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strated, this proof came in, not under the umbrella of a conspiracy theory, but, rather, as circumstantial evidence linking appellant Arcuri to the vehicle used in the crime of which appellants were convicted, possession of phenobarbital with intent to distribute. Even so, we note that as a general proposition, evidence admitted to prove a conspiracy charge may be used as proof of other charges in an indictment even when there is an acquittal on the conspiracy count. *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975), *cert. denied, sub nom Scardino* v. *United States*, 425 U.S. 960 (1976).

time did he possess the pills once he knew they were contraband.

The evidence before the jury demonstrated that the bottles of phenobarbital were clearly labeled. Even if the jury concluded that appellant Sciotto believed that they were "headache pills" when he initially called Grande on May 18, 1976, once the bottles were opened, it is reasonable to infer that from that time on he knew they contained contraband. Furthermore, Sciotto's attempts to obtain money, as evidenced by his initial visit to the laundromat on May 19, 1976, when he told Grande "they want four cents apiece for them" (50), his telephone conversation with Grande later that day when he said "the guys wanted $500" (51), his recorded conversation with Grande on May 20th, 1976 when a meeting to discuss "an offer of two cents" was arranged, and his statement to Grande at the laundromat in the presence of Agent McKinley that "the fellows" were there "to collect the money" (67), compel the conclusion that he was arranging a deal to sell the phenobarbital. From the evidence of Sciotto's delivery of the contraband, his calls to Grande about a possible sale, and his appearance at the laundromat to consummate a deal for the phenobarbital pills which he assumed were still on the premises, it can be inferred that appellant Sciotto had "dominion and control" over the phenobarbital pills, although they were physically located in Grande's laundromat. See *United States* v. *Infanti*, 474 F.2d 522, 526 (2d Cir. 1973).

In short, the cumulative weight of the evidence of Sciotto's statements and conduct concerning the phenobarbital tablets, his delivery of the pills to Grande, his arrival at the laundromat and his statements about money after arranging a meeting to discuss a deal was sufficient "relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that

the accused was guilty." *United States* v. *Glasser*, 443 F.2d 994, 1006 (2d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971), quoting from *American Tobacco Co.* v. *United States*, 328 U.S. 781, 787 (1946).

B. *Arcuri*

Appellant Arcuri also challenges the sufficiency of the evidence to show his knowing participation in the illicit venture. Arcuri argues that since he did no overt act to assist Sciotto in selling the phenobarbital and as there was never any discussion about the phenobarbital pills in his presence, the Government failed to prove that he (Arcuri) knew about Sciotto's scheme to sell the contraband.

The evidence showed that following Sciotto's dealings with Grande on May 19th and the phone calls of May 20th, Arcuri entered the laundromat with Sciotto, was referred to as one of the "fellows that come for the money," (67), had Agent McKinley introduced to him as "the gentleman who offered two cents," and in response to Grande's question, told Grande that Sciotto would talk to McKinley about the money (73). In addition, the evidence clearly established Arcuri's connection with the 1972 white Lincoln, the vehicle in which the contraband was delivered. Based on all the evidence, the jury could properly find the necessary purposeful behavior in the joint venture to establish aiding and abetting on the part of Arcuri. *United States* v. *Licursi*, 525 F.2d 1164 (2d Cir. 1975).

C. *Rothaar*

Appellant Rothaar contends that the evidence showed nothi ~ but mere presence at the laundromat. We disagre

To begin with, following the delivery of the pills on May 19th and the phone call of May 20th, the jury could infer from Sciotto's statement that "the fellows [are here] to collect the money," combined with the fact that Arcuri and Rothaar never once left each other's side, that Rothaar came to the laundromat with Arcuri to consummate the sale of the phenobarbital. In addition, Rothaar made no effort to divorce himself from the discussions with McKinley about the price of the tablets. And the jury could properly conclude that when Rothaar shook his head from side to side, he was rejecting the offer of a price of 2 cents per tablet or indicating that he felt McKinley was an undercover agent or policeman.

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
September 12, 1977

Respectfully submitted,

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Of Counsel.

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(Rd. 9-4-64)

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

Kelvin Outlaw being duly sworn,

deposes and says that he is employed in the office of U.S. Attorney

United States Attorney for

the Eastern District of New York, attorney for the Appellee

herein.

That on the 15th day of September 19 77 he did serve a true copy of

the hereto annexed ~~Brief For the Appellee~~

on the office of Martin Light

attorney for the Appellant herein, located at 66 Court St

Borough of Brooklyn, City of New York, by leaving a true copy of the same with the person in charge of said office, there being no one present who was authorized to give an admission of service.

Kelvin Outlaw

Sworn to before me this

15th day of September 19 77

Barbara A. Allen

BARBARA A. ALLEN
Notary Public, State of New York
No. 24-4616824
Qualified in Kings County
Commission Expires March 30, 1978